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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

No. 74-1238

DEPARTMENT OF REVENUE, State of Washington,
Petitioner,

v.

THE CARRINGTON COMPANY, a Washington Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
1. The instant case is in conflict with a decision of the United States Court of Appeals for the Ninth Circuit: *Sumitomo Forestry Co. Ltd. of Japan v. Thurston Cy.*, ... F.2d ..... (1974).	4
2. The instant case is in conflict with a decision of the United States Supreme Court: *Kosydar v. National Cash Register Co.*, ... U.S. ....., 40 L.Ed.2d 660, 94 S.Ct. 2108 (1974).	7
3. The instant case is a case of first impression in that it involves the question: whether domestic sales to the U.S. government of goods for use overseas are sales for export.	9
CONCLUSION	10
APPENDIX A—Opinion Below	11
APPENDIX B—Remittitur and Order Below Denying Rehearing	45
APPENDIX C—RCW 82.04.250	48
APPENDIX D—*Sumitomo Forestry Co. Ltd. of Japan v. Thurston County, Washington*, CCA 9th, Oct. 8, 1974	49
APPENDIX E—*Kosydar v. National Cash Register Company*, ... U.S. ....., 40 L.Ed.2d 660, 94 S.Ct. 2108 (1974)	59
APPENDIX F—Excerpt from Petitioner's Reply Brief in Court Below	72

CITATIONS

CASES:

Carrington Co. v. Dept. of Revenue, 84 Wn.2d 444, ... P.2d 5, 6, 7, 9

Coe v. Errol, 116 U.S. 517, 29 L.Ed. 715, 6 S. Ct. 475 5

DeCoteau v. District County Court, Supreme Court Docket Nos. 73-1148 and 73-1500, decided March 3, 1975, ... U.S. ....., ... L.Ed.2d ....., ... S.Ct. 4, 6

Kosydar v. National Cash Register Co., ... U.S. ....., 40 L.Ed.2d 660, 94 S.Ct. 2108 ..... 5, 7, 8, 9

Sumitomo Forestry Co. Ltd. of Japan v. Thurston Cy., No. 72-2395, October 8, 1974, ... F.2d 4, 5, 6, 8

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Constitution, Art. I, Sec. 10, Clause 2 ..... 2, 3, 9

Revised Code of Washington 82.04.250 3

28 U.S.C. 1257(3) 2

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above entitled case on October 10, 1974 which became final on January 3, 1975.

OPINION BELOW

The opinion of the Washington State Supreme Court reproduced in Appendix A hereto, is reported in 84 Wn.2d 444, ... P. 2d .....

JURISDICTION

The opinion of the court below was filed on October 10, 1974. (Appendix A, *infra.*). In Washington, no separate judgment is entered. A timely petition for rehearing was filed with the Washington State Supreme Court. The petition for rehearing was denied and remittitur was entered on January 3, 1975. (Appendix B). Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Is a taxpayer immune from a state retail excise tax as an impost or duty upon exports in violation of Article I, Sec. 10, Cl. 2 of the United States Constitution (the Export-Import Clause) (i) when the retail sales are consummated by delivery of the goods to a local in-state warehousing and repacking facility of the General Services Administration of the United States Government (GSA) and (ii) it is contemplated that the goods will be shipped overseas by the GSA to fill orders that the GSA has received from overseas military establishments?

2. Can goods be in the first step of a continuous unbroken movement to overseas purchasers within the purview of Article I, Sec. 10, Cl. 2 of the United States Constitution (the Export-Import Clause) (i) when the goods are delivered by the seller to in-state storage and repacking facilities of the General Services Administration of the United

States Government (GSA) and (ii) when the movement of the goods in foreign commerce involves transhipments and subsequent transactions between the GSA and United States overseas military establishments?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 10, Clause 2.

Revised Code of Washington 82.04.250. (Appendix C)

STATEMENT OF THE CASE

The Washington State Supreme Court ruled in this instant case that the sales activity between a Washington corporation and a department of the United States Government (GSA) constituted an export and was therefor exempt from the business and occupation excise tax imposed on retail sales activity (Revised Code of Washington 82.04.250) by virtue of U.S. Constitution Art. I, Sec. 10, Clause 2. The sale activity took place before the goods were shipped by truck from Seattle, Washington to a Tacoma, Washington storage facility. There the goods were inspected for compliance with specifications and then packaged for overseas shipment to United States military establishments in Southeast Asia, Korea and Japan.

The inspection and package function at the

storage area took an average of 7 to 8 days. The overseas movement involved different parties and different transactions from those involved in sales of the goods to the GSA by the taxpayer and the taxpayer's delivery of the goods to the GSA Tacoma, Washington facilities. Nevertheless, the court held that when the goods were loaded on trucks at Seattle it was certain that the goods were destined for export and that the inspection and packing in Tacoma was not a break in the stream of export but rather was in furtherance of it. Attached as Appendix F is petitioner's recital and analysis of the facts in this cause as set forth in its reply brief in the court below.

REASONS FOR GRANTING THE WRIT

1. The decision of the Washington State Supreme Court in this case is in conflict with that of the United States Court of Appeals for the Ninth Circuit in its October 8, 1974 decision in the case of *Sumitomo Forestry Co. Ltd. of Japan v. Thurston County, Washington,* No. 72-2395 (Appendix D.) (See *DeCoteau v. District County Court,* Nos. 73-1148 and 73-1500, decided March 3, 1975.)

The case of *Sumitomo Forestry Co. Ltd. of Japan v. Thurston County supra* involved the question of the validity of an *ad valorem* property tax on logs purchased by Sumitomo in the state of Washington and held in storage at the port of Olympia awaiting loading on board ships bound for Japan. The county taxing officials contended that the logs

did not begin their export process until they were loaded on the ship to be transported to Japan. The taxpayer argued that all the logs stored at the port awaiting the first available ship had begun the export process and were exempt from taxation. The court relied on *Coe v. Errol*, 116 U.S. 517, 29 L.Ed. 715, 6 S. Ct. 475 (1886) and the standard it set down for the point at which goods commence an interstate or export journey. The Court of Appeals pointed out *Kosydar's* reaffirmation of *Coe v. Errol.* Sumitomo's logs were held not to be exports while stored at the port awaiting shipment. The holding and reasoning of the instant case puts *Sumitomo* in serious question. In *Carrington*, the instant case, the dissent said at 84 Wn.2d 453:

> "Thus, under the court's decision, for example, if a Japanese corporation, or any foreign corporation, should buy standing timber in the state of Washington, and ticket it irrevocable for ultimate shipment to Japan, it would, under this court's decision, pass to the posts as an export completely free of all state excises and ad valorem taxes." (Appendix A, page 24)

There are now pending in the courts of the state of Washington and in the U.S. District Court for the Western District of Washington over a dozen cases involving the *ad valorem* property taxation of logs which have been exported to Japan. The *Sumitomo* case was thought to be dispositive of these cases. That was before *Carrington*, the instant case. Presumably, those in state court will follow

Carrington; those in the U.S. District Court will follow *Sumitomo.*

As indicated in the recent case of *DeCoteau v. District County Court*, Nos. 73-1148 and 73-1500 (decided March 3, 1975), conflict between a state Supreme Court decision and a Court of Appeals decision poses circumstances under which this court will grant a Writ of Certiorari. In the *DeCoteau* case this court had to resolve a conflict between decisions of the Supreme Court of South Dakota and the Court of Appeals for the 8th Circuit concerning the effect of an 1891 act of Congress on South Dakota's civil and criminal jurisdiction over unallotted lands within the 1867 reservation boundaries of the Lake Traverse Indian Reservation. As in the instant case, the conflict resulted from different interpretations and application of this Court's prior decisions. In granting certiorari in the *DeCoteau* case, *supra*, this court noted:

> "We granted certiorari in the two cases, 417 U.S. 929, to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the 8th Circuit as to the effect of the 1891 act on South Dakota's civil and criminal jurisdiction over unallotted lands within the 1867 reservation boundaries."

Following this recent precedent it is respectfully requested that this court grant certiorari in this cause to determine whether the rule of law enunciated in *Sumitomo* or in *Carrington* constitutes an appropriate interpretation and application of this

court's decisions pertaining to a state's jurisdiction to tax property or activity related to exports.

2. The decision of the Washington State Supreme Court in this case is in conflict with that of the May 20, 1974 decision of the United States Supreme Court in *Kosydar v. National Cash Register Company*, No. 73-629, 42 U.S.L.W. 4767, ... U.S. ....., 40 L.Ed.2d 660, 94 S. Ct. 2108 (1974). (Appendix E)

Kosydar v. National Cash Register Company, supra, was decided subsequent to submission of *Carrington* to the Supreme Court of Washington. A copy of the opinion was furnished the Court by counsel for the State after submission of the case. The majority in the court below does not refer to *Kosydar*. The minority opinion beginning at 84 Wn.2d 462 (Appendix A, p. 38) discusses it. The majority's silence with respect to *Kosydar* is almost essential to its holding because of the similarity of the facts between the two cases. There are few if any distinguishing characteristics. Other than there being involved different taxes and different ownerships of the storage facilities, the two cases are remarkably similar. Petitioner submits they are irreconcilable. Any factual differences weigh in favor of this Court's reversal of *Carrington* on authority of *Kosydar*. In the instant case the overseas entity of the United States government purchasing through the GSA for overseas delivery was not a party to the transactions giving rise to the taxpayer's tax liability.

In fact, the conflict between the case at bar and *Sumitomo* stems from the fact that the 9th Circuit in *Sumitomo* considered and properly applied this court's decision in *Kosydar* while the majority of the Supreme Court of Washington in the case at bar did not do so.

Failure of this Court to grant certiorari will do a great disservice to taxing authorities and taxpayers alike for a reason which the 9th Circuit touched upon in Footnote 4 of *Sumitomo* wherein it quoted from *Kosydar* as follows:

> "It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtue. The court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, 'it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question.' *Coe*, *supra*, at 526."

The existence of *Kosydar* and *Sumitomo* on the one hand and the case at bar on the other creates the very ambiguity and confusion which this court in *Kosydar* condemned.

It is thus respectfully submitted this court should grant certiorari in this cause not only to resolve the conflict between this cause and *Sumitomo* but also to resolve the conflict between the Supreme

Court of Washington's decision in this cause and this Court's decision in *Kosydar*.

3. The decision of the Washington State Supreme Court in this case involves a question of first impression: Whether the sale of goods by a domestic corporation to a United States Government agency (GSA) where those goods are destined for shipment to another United States Government agency (certain military establishments) in a foreign nation constitutes an export within the meaning of Article I, Sec. 10, Cl. 2 of the United States Constitution.

In the instant case, *Carrington*, a supplier of International Harvester equipment parts and accessories entered into a contract in Washington with the GSA of the United States Government in Auburn, Washington, to supply certain repair parts and accessories for overseas use by military establishments ordering the same from the GSA in Auburn, Washington. Carrington, a Washington retailer doing business solely in Seattle, Washington, delivered the repair parts and accessories to a storage and repacking facility of the GSA in Tacoma, Washington. At the GSA facility in Tacoma, Washington, the repair parts and accessories were placed in bins and repackaged for shipment overseas in accordance with the orders received by the GSA from overseas military establishments. There is thus posed the question of whether or not delivery of products to the United States Government within the United States continental limits by a supplier constitutes an

export within the meaning of the Import-Export Clause of the United States Constitution. More specifically the question posed is whether Carrington in conducting its retail business in connection with the Auburn office of the GSA was engaged in export activity because the products it delivered to the GSA facilities in Tacoma, Washington, were destined for overseas shipment and use by United States military establishments. To our knowledge this is a unique question which has not been passed upon by this Court. In petitioner's view of the case, when the GSA receipted for the repair parts and accessories from Carrington at its Tacoma warehousing and repacking facility, these products were not in the stream of export and did not enter the stream of export until the GSA by additional sales and contractual arrangements provided for the movement of goods to the overseas military establishments.

In order to resolve the question of when an in-state sale to the United States Government constitutes an export it is respectfully submitted that this court should grant the Writ of Certiorari in the instant case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Washington.

APPENDIX A

[No. 42791. En Banc. October 10, 1974.]

THE CARRINGTON COMPANY, *Respondent*, v. THE DEPARTMENT OF REVENUE, *Appellant*.

[1] **Taxation — Commerce — Exports — Owner — Nationality.** The constitutional provision forbidding state taxes on exports (U.S. Const. art. 1, § 10) is unaffected by the fact that goods being exported are owned by the United States government.

[2] **Taxation — Commerce — Exports — Tax Prohibition — Construction.** While neither an intent to export nor actual exportation alone suffices to acquire constitutional protection from taxation on exports, the application of such protection is subject to a liberal construction by the courts.

[3] **Taxation — Commerce — Exports — Export Stream — Interrupted Movement — Effect.** Prohibition of state taxes on exports is effective at the time the object enters the export stream and is unaffected by temporary interruptions to its movement when such interruptions are for reasonable purposes and are in furtherance of the intended transportation of the object.

[4] **Taxation — Commerce — Exports — Export Stream — Divergence — Showing.** While a showing of actual or probable divergence of an object from the export stream may be sufficient to overcome the prohibition upon its taxation by a state, the mere theoretical possibility that

such an object may be diverted before its exportation is irrevocable is not grounds for permitting the imposition of state taxes upon the object once it has entered the export stream.

[5] **Taxation — Commerce — Exports — Tax Prohibition — Retailing Tax.** Imposition of the business and occupation tax on retailing results in a prohibited state duty on exports when goods are purchased for the purpose of export, and such goods enter the export stream immediately upon leaving the seller.

HALE, C.J., and ROSELLINI, HUNTER, and HAMILTON, JJ., dissent by separate opinion.

Appeal from a judgment of the Superior Court for Thurston County, No. 46494, Robert J. Bryan, J., entered April 3, 1973. *Affirmed.*

Action seeking a refund of state taxes. The defendant appeals from a judgment in favor of the plaintiff.

Slade Gorton, Attorney General, Timothy R. Malone, Senior Assistant, and *Henry W. Wager* and *William Dexter, Assistants,* for appellant.

Ashley, Foster, Pepper & Riveria and *David W. Sandell,* for respondent.

BRACHTENBACH, J.—The states are prohibited from levying any impost or duty upon imports or exports. U.S. Const. art. 1, § 10.

Our business and occupation tax law accom-

modates this restraint by excluding from that tax amounts derived from business which the State is prohibited from taxing under the United States Constitution. RCW 82.04.430(6).

Here we are concerned with the correctness of the trial court's holding that plaintiff's sales, as described later, involved exports and therefore were free from the state business and occupation tax on retailing as imposed by RCW 82.04.250. Plaintiff seeks a refund, pursuant to RCW 82.32.180, of the tax assessment made by the State.

Before considering the facts, we shall set out the principles which necessarily guide us in determining whether this tax does what the constitution prohibits.

[1] At the outset we note the case is somewhat unique in that the United States Government itself is the purchaser. While most export cases involve a foreign purchaser, there is no authority that such is an implied requirement of the constitutional provision. Indeed it has been held that the United States, as a buyer for export, is entitled to the benefit of the prohibition against taxes on exports. *Union Oil Co. v. Los Angeles*, 227 Cal. App. 2d 608, 38 Cal. Rptr. 923 (1964).

[2] To enjoy the constitutional protection as an export, goods must have entered the export stream with certainty of a foreign destination. Neither intent to export nor the ultimate fact of actual ex-

portation alone is sufficient to invoke the immunity. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946); *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154, 93 L. Ed. 1276, 69 S. Ct. 995 (1949).

It must be recognized that the prohibition is absolute except for the very narrow exception of allowing the imposition of inspection fees. *Richfield Oil Corp. v. State Bd. of Equalization, supra.*

The United States Supreme Court cases mandate that exports be given liberal protection. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 67 L. Ed. 865, 43 S. Ct. 485 (1923), so states; and *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19, 59 L. Ed. 821, 35 S. Ct. 496 (1915), illustrates application of a liberal approach by holding that the protective umbrella is great enough to prohibit a stamp tax on insurance policies insuring the exported goods.

[3] Entry into the export stream must be the start of a continuity of movement. *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 73 L. Ed. 626, 49 S. Ct. 292 (1929). Yet the journey may be interrupted if the purpose of the interruption is "reasonable and in furtherance of the intended transportation." *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 476, 71 L. Ed. 359, 47 S. Ct. 170 (1926). The point has been otherwise stated as allowing interruption to "promote the safe or convenient transit" of the goods.

Champlain Realty Co. v. Brattleboro, 260 U.S. 366, 376, 67 L. Ed. 309, 43 S. Ct. 146, 25 A.L.R. 1195 (1922). In application the following situations have been deemed to be permissible interruptions: (1) holding of logs in a boom in a river to await subsidence of high water, *Champlain Realty Co. v. Brattleboro, supra;* (2) shipment to an independent export packer for preparation for ocean travel, *Gough Indus., Inc. v. State Bd. of Equalization*, 51 Cal. 2d 746, 336 P.2d 161, *cert. denied*, 359 U.S. 1011, 3 L. Ed. 2d 1037, 79 S. Ct. 1151 (1959); (3) accumulation and storage for convenient and efficient loading of ships. *Cargill of Cal., Inc. v. County of Yolo*, 26 Cal. App. 3d 704, 103 Cal. Rptr. 257 (1972), *Carson Petroleum Co. v. Vial, supra.* Some of these cited cases involved the commerce clause, but the rationale is pertinent here.

[4, 5] It was contended in a number of these cases, as does the State here, that the owner of the goods might divert them from the export stream since they are not irrevocably bound overseas until they are on board the ship. In *A.G. Spalding & Bros. v. Edwards, supra*, a New York company purchased goods for a foreign company. A tax on the manufacturer of the goods was struck down and Mr. Justice Holmes stated at page 69:

> The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. * * * Neither does it

> matter that the title was in [the foreign buyer's agent] and that theoretically they might change their mind and retain the bats and balls for their own use. * * * Theoretical possibilities may be left out of account.

Hughes Bros. Timber Co. v. Minnesota, supra, was a commerce clause case, but the court said at page 475:

> The character of the shipment in such a case [when the owner retains control of the transportation and can divert] depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation * * *

Turning to the facts, we find that the plaintiff was the successful bidder to supply parts and equipment of a specified make to the General Services Administration of the United States (GSA). From the invitation to bid to the accomplished fact, all such items were destined for and delivered to military installations in Southeast Asia, Korea and Japan. All sales in the relevant period of 1967-71 were pursuant to individual GSA purchase orders, each of which identified a particular part, a named overseas recipient and a specific overseas destination. Pursu-

ant to the purchase order requirements, the shipments were trucked from Seattle to GSA's Tacoma packing facility. The Tacoma facility had been established for the sole purpose of packing items for overseas shipment to United States military establishments. On the average, materials were at the packing operation for only 7 or 8 days before being loaded on a ship or airlifted out. During that time they were inspected for compliance with specifications and packaged for overseas shipment.

From these facts, the court concluded that when the items were loaded on the trucks in Seattle it was certain that they were destined for export, that they then entered the export stream and that the packing in Tacoma was not a break in the stream of export, but in furtherance of it. We agree. The bid itself specified that the goods were for export. The purchase orders identified the recipient overseas agency and the foreign destination. The delivery, without exception, was to a facility designed solely to package the goods for overseas shipment. Under these facts it is conclusive that there was a meshing of the certainty of export with the commitment to and actual commencement of transportation in the export stream. There was no diversion and the possibility of diversion was merely hypothetical and remote. Realities and probabilities are controlling, not theoretical possibilities.

The State relies on our decision in *Eardley Fisheries Co. v. Seattle*, 50 Wn.2d 566, 314 P.2d 393

(1957). That case enunciates principles in accord with our decision here, but the facts distinguish it. The goods in *Eardley* were frozen seafood held by the seller in cold storage depots for periods as long as 120 days before the government accepted delivery. Domestic use was obvious and found to exist. The tax accrued upon delivery to the local storage. The court correctly held that at the time of sale, delivery to the storage, there was no certainty of export of identifiable goods nor entry at that point into the export stream.

Finally the State's own administrative rule, WAC 458-20-193C(3) acknowledges that something short of delivery at dockside will constitute entry into the export stream. It states that it is sufficient if there is delivery to "other vehicles of transportation under circumstances where it is clear the goods will be taken to a foreign destination." Those are the circumstances here; it is clear and the trial court was correct.

The judgment is affirmed.

FINLEY, STAFFORD, WRIGHT, and UTTER, JJ., concur.

HALE, C.J. (dissenting)—The court, I think, fails to make that fundamental distinction upon which nearly all state revenue depends: The difference between a thing to be taxed and the business of making, transporting and selling it; the difference between taxing the privilege of retailing and taxing

the goods themselves. There are other differences, too, but unless that primary distinction is observed by the courts, a major segment of business, commercial and financial activity within the state will be sheltered from business and occupation taxes. I would preserve that distinction in interpreting the revenue laws and, therefore, dissent.

The Carrington Company engages in the business of selling and distributing construction equipment, farm machinery and replacement parts. In accordance with a governmental publicly-called bid and award, Carrington entered into a contract with the United States Government through the government's General Services Administration (GSA) to sell numerous pieces of construction machinery which the government intended to supply to American military establishments in Southeast Asia, Korea and Japan.

At the time, this country had long been and was still engaged in a bloody conflict in Vietnam, suffering enormous casualties upon the battlefield and in the air, expending its resources in astronomical proportions without the legal and constitutional sanction of a declaration of war by the Congress of the United States. Neither party to this suit has seen fit to raise the point that the machinery in issue here had been purchased for and was consigned to be used in the prosecution of an undeclared and presumptively unconstitutional war of long duration. The main point to this is that, in the call for bids and the contract to

purchase, the executive branch (GSA) did not purport to act pursuant to a declaration of war by the Congress (U.S. Const. art. 1, § 8, clause 10); nor assert freedom from state taxation on behalf of its suppliers as a war-waging agency; nor claim any immunities for and on behalf of a sovereign that vendors of machinery, during and for the prosecution of the Vietnam conflict, be exempt from the State's retailing tax. The record shows no general or specific claim whatever of exemption by the United States.

All business activity connected with the bidding, the sale and the delivery of heavy construction equipment to the General Services Administration, so far as the United States was concerned, therefore, contemplated that all state and local taxes ordinarily applicable to the sale and delivery of machinery would likewise apply to the performance of the Carrington Company's contract. The exemption claimed here that the sale constituted an export as between the parties must, therefore, be deemed a unilateral afterthought, generated by the Carrington Company and not based on any claim by the United States, for the federal government is calling for bids did not assert any sovereign exemption from state and local taxation on behalf of its suppliers.

The business activity which the State here seeks to tax under RCW 82.04.250 was the retailing of heavy construction equipment by the Carrington Company to the General Services Administration of the United States. In performing its contract to sell

this equipment, the Carrington Company would receive from the GSA a specific purchase order; it would fill the order by packing the machinery for transportation to the GSA depot and then truck it to the GSA packing facility in Tacoma, a facility controlled and operated by the United States. Title to and ownership in the equipment passed to the United States on delivery. Upon receiving the machines, GSA repacked them at its Tacoma facility for overseas transportation, loaded them onto ships or delivered them to airports and, with a few exceptions, sent them abroad. After arrival at the GSA facility in Tacoma, but prior to shipment either by air or sea, the equipment remained at the GSA facility for about 15 to 18 days. As earlier noted, title passed to the GSA not later than delivery. After taking delivery of the machines, GSA could do with them as it desired, either store them, ship them to another domestic port, ship them to its own or a foreign entity abroad.

Whatever the parties may have intended or contemplated as to the ultimate disposition of the machinery, their views would have little to do with fixing taxability because the goods were not irrevocably in foreign commerce until loaded and the ship or airplane carrying them had cleared for a foreign port. The GSA facility to which Carrington delivered the equipment and where it was repacked for overseas shipment was at all times free to change its destination. After repacking at its facility, GSA cus-

tomarily delivered the equipment to the Port of Tacoma dock to be there loaded onto a ship for overseas transport or sent it to either McChord Air Force Base in Tacoma or Travis Air Force Base in California for shipment by air. As previously noted, however, a few of the pieces of machinery during the period relevant here, January 1, 1967, to March 31, 1971, were not sent overseas.

The court declares the machinery and equipment which Carrington sold to GSA to be exports and, therefore, exempt under U.S. Const. art. 1, § 10, which bars the imposition of local taxes on exports and imports:

> No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

In construing the constitutions, the courts, I think, are bound to point out some direct connection between the language of the constitution and the rule announced. They are not free to ascribe to the constitutions whatever meaning they choose at the moment to give them, nor to revise the constitution under the guise of interpretation. Accordingly, in determining whether given commodities or the com-

mercial processes related to them constitute "exports" within the meaning of the constitution, first resort should bc to the language of the constitution. If this is done here, any reference to the business of selling at wholesale or retail or the business of exporting is conspicuously absent for the tax immunity claimed here is narrowly stated by the word "exports." The constitution does not say that the state may lay no impost or duty on goods manufactured for export, or in transit for export, or consigned to the export trade, or those moving in the stream of interstate or foreign commerce. All of these concepts are excluded by the precise and limited language and the use of two definitive nouns instead of phrases, *i.e.*, *imports* and *exports.*

Nor should the courts allow the parties to the transaction to determine taxability by agreement, either tacit, implied or declared. Whether the goods are exports as a matter of law or fact should not depend upon and the court should reject a rationale that the parties, or either of them, to a business transaction can determine the taxable status of goods, activities or business merely by labeling the goods or the activities affecting them or by declaring their intentions about either. Where there is a dispute in the facts, or even if the parties agree to the facts when inferences of taxability contrary to their conclusions can be reasonably drawn, the court in its fact-finding and conclusionary powers may differ markedly from the parties in its finding of fact and

conclusion of law as to the taxable events concerning the goods, activity or business.

In this case, the facts are not in dispute. The conclusions to be drawn from them, however, are, I think, a question of law. If the *sale* of these machinery items constitutes an export, as distinguished from the business of selling goods ultimately intended for overseas shipment, then it follows that nearly all goods and items of commerce consigned for overseas shipment once documented for overseas consignment must move in commerce free not only of ad valorem taxes in transit but free of the impingement of any tax and excise imposed upon the business of rendering any services whatever affecting such item of commerce.

Thus, under the court's decision, for example, if a Japanese corporation, or any foreign corporation, should buy standing timber in the state of Washington, and ticket it irrevocably for ultimate shipment to Japan, it would, under this court's decision, pass to the ports as an export completely free of all state excises and ad valorem taxes. All of the business and manufacturing activities affecting the purchasing, cutting, logging, hauling, sawing, planing, storing, and the many other taxable activities concerning the logs and the lumber derived from them would be free of taxes now imposed by the State's business and occupation tax. Or, if standing timber were purchased by a foreign corporation, irrevocably marked by the parties for export and by

agreement manufactured into plywood and irrevocably earmarked for sale and delivery to the foreign purchaser overseas, all of the business and manufacturing activities related to these transactions would likewise be exempt from state excises under the constitutional bar against taxing exports.

That the constitution does not intend to exempt goods from state and local taxes is apparent in the use of the narrow and precise employment of the noun "export," a word which must be taken to mean nothing more than that, until the goods reach that inevitable point where they are no longer a part of the mass of goods within the state, they are not "exports." The plan, design, intent and purpose of the seller and buyer or either of them that the goods will ultimately be shipped overseas, even if they are finally so transported is, therefore, not the test of taxability nor enough to confer a tax immunity upon the multifarious business activities of financing, growing, fabricating, shaping, manufacturing, trucking, warehousing, wholesaling and retailing them which take place while the goods in their various stages of development are a part of the mass of property within the state. Only when the *goods* have achieved the final and irrevocable entry into the export stream do they become exports, free of local and state taxes. The intangible activity of selling the goods should not be mistaken for the tangibles themselves.

Putting the goods — as the expression goes —

into the export stream, does not suffice to make them exports; they do not become exports until irrevocably — and as between the parties — and irretrievably committed to foreign shipment, for the intentions of those claiming a property or possessory right are of little moment in determining the status of the property for taxation purposes. This principle, I think, emerged in *Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154, 93 L. Ed. 1276, 69 S. Ct. 995 (1949), a decision delivered upon this very subject some 3 years after *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), upon which this court relies so heavily now.

The Washington State Department of Revenue recognized this rigid standard of irrevocable export in specifying:

> *In all circumstances there must be* (a) *a certainty of export and* (b) *the process of export must have started.*

(Italics mine.) WAC 458-20-193C. However, the standard may be phrased then, until the moment when the goods are irrevocably committed to be exported, they are not exports. A clear example of exports would be goods consigned to an overseas destination and stowed on board a ship which has cleared the port for foreign destination. Although one may conjure up an earlier point of irrevocability, until it has been reached the goods remain a part of the mass of property within the state in which the port is situated. The constitution does not before that

point relieve either the goods or those doing business with respect to them of their fair share of the taxes assessed upon them and the business activities related to them. A contrary rule, one which permits the goods to be designated as exports at a time prior to actual export, for example, at the time the owner, seller, or buyer has intended them for export or agrees that they will be exported, must necessarily operate to immunize the business activities affecting major quantities of goods, wares and merchandise from state taxation not only at dockside or at the airport but at various earlier points in their development—and conceivably running back to a point when the raw materials are removed from the earth and continuing throughout all subsequent extracting, refining, manufacturing, transporting, wholesaling and retailing processes. That most or even all of the goods are ultimately exported does not make them exports while they are within the state and a part of the mass of property in the state.

An early statement of controlling principles is found in *Coe v. Errol*, 116 U.S. 517, 525, 528, 29 L. Ed. 715, 6 S. Ct. 475 (1886):

> When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for trans-

portation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

* * * Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding.

and

Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation

> is a matter altogether *in fieri*, and not at all a fixed and certain thing.

The Supreme Court of the United States affirmed the *Coe* case in *Turpin v. Burgess*, 117 U.S. 504, 507, 29 L. Ed. 988, 6 S. Ct. 835 (1886), but affirmed too the proposition that the intention of the parties to export the goods counts for little:

> How can the officers of the United States, or of the State, know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds.

Eighteen years later, the court again held that the goods are not exports until the seller has taken action to irrevocably place the goods in their final movement out of the country. *Cornell v. Coyne*, 192 U.S. 418, 48 L. Ed. 504, 24 S. Ct. 383 (1904). It follows, therefore, that anything short of the final and irrevocable commitment to export does not suffice to remove the goods from the mass of taxable property within the state.

In the instant case, from the time the contract to sell was entered into until transfer of ownership with delivery to the GSA at its facility, the machinery was a part of the mass of property within the state, and remained so thereafter for several later phases not relevant to the issue of taxability. All of the

transactions respecting the machinery and upon which the State levies its business and occupation tax took place within the state of Washington before the goods were repacked for overseas shipment by the GSA, for the State is not attempting to impose a tax upon the machines as an export but rather upon the vendor's privilege of engaging in the business of selling them—a business activity occurring throughout all stages of the transaction between Carrington and the General Services Administration.

The court, as noted, relies on *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 79, 91 L. Ed. 80, 67 S. Ct. 156 (1946), but I think that case, too, sustains the tax in the present case. There, Richfield Oil Company sold oil taken from California wells and delivered it from its dockside tanks into the tanks of a foreign ship moored at the port. The State of California sought to levy and collect its retail sales tax, a tax measured by the gross value of the delivered oil in the ship's tanks. In accordance with the parties' declared intentions, the oil had been sold, delivered to portside and loaded into the foreign ship for shipment and delivery to a foreign buyer at a foreign port, and all papers relating to the transaction showed this to be so, including the ship's declared destination. Declaring that the delivery of the oil into the tanks of the foreign ship, consigned for delivery to a foreign buyer at a foreign port converted the oil into an export and thus immune from imposition of state sales tax, a divided court in *Richfield* never-

theless adhered to the long-standing general rule in citing *Coe v. Errol, supra*:

> "* * * [G]oods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

And further stated the rule of *Cornell v. Coyne, supra*, which said:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation."

Empresa Siderurgica, S.A. v. County of Merced, 337 U.S. 154, 93 L.Ed. 1276, 69 S. Ct. 995 (1949), a case I believe to be controlling here amplifies this rule further. In *Siderurgica*, a cement manufacturing plant in California had been sold to and for export to a foreign purchaser and both an export license and a letter of credit were obtained in favor of the seller. The foreign purchaser took title and possession in California and employed a common carrier to dismantle the plant and prepare it for shipment. As the dismantling proceeded, the carrier labeled the com-

ponents with the purchaser's name as consignee and delivered them to a railroad for shipment. After 12 percent of the plant had been shipped and with the remaining 88 percent of it prepared for shipment, dismantled and not prepared, and some of it not yet dismantled, the County of Merced levied an ad valorem personal property tax on all of the 88 percent which had not yet been shipped. Sustaining the tax upon all of the plant components still unshipped and which could be reached by the County, the court pointed out that even if a diversion of the components from their foreign destination to a domestic would constitute *a breach of contract*, the determinant of export was whether there existed a possibility or capability of diversion. Regardless of the parties' intentions, if the articles could have been diverted from a foreign port—notwithstanding that this diverting would breach the contract—the goods were not to be treated as exports until the export process had been rendered irrevocable. On this point, the court said, at page 157:

> So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part

> of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed.

The court, in *Empresa Siderurgica* noted that the test in *Coe v. Errol, supra,* was to determine the validity under the commerce clause of nondiscriminatory state tax and that *Richfield* made the test equally applicable to cases arising under U.S. Const. art. 1, § 10. The court further stated the general principles of the earlier cases by saying, at page 156:

> Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. [Cases cited.] The tax immunity runs to the process of exportation and the transactions and documents embraced in it.

The court amplified this with a further statement of general principles, at page 157:

> It is the entrance of the articles into the export stream that marks the start of the process of exportation. *Then there is certainty* that the goods are headed for their foreign destination and will not be diverted to domestic use. *Nothing less will suffice.*

(Italics mine.) In other words, the goods have not

entered the export stream until it is certain that they cannot be diverted. *Nothing less than certainty of export will suffice to make the goods exports.*

Shortly after *Siderurgica*, the court again held that even a possibility of diversion to a domestic destination kept the goods from being treated as exports for state tax purposes. It ruled that gasoline sold for export and foreign delivery was taxable by the state and not immune as an export even though delivered to a carrier for shipment overseas, because that final and irrevocable joinder into the export stream had not yet been reached. Thus, in *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286, 288, 93 L. Ed. 1366, 69 S. Ct. 1075 (1949), the court said:

> While in storage, the gasoline might have been diverted to domestic markets without disruption of any existing arrangement for its transshipment and without even breach of any contractual commitment to a foreign purchaser. Neither the character of the property nor any event equivalent to its redelivery to a common carrier made export certain for all practical purposes. See *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 82.

We have earlier adopted principles which I think the court now overrules *sub silentio*. In *Eardley Fisheries Co. v. Seattle*, 50 Wn.2d 566, 568, 314 P.2d 393 (1957), a case which appears to me to be controlling, we set forth the facts as follows:

> The transactions between the appellant and the United States government began and ter-

> minated within this state. The seller's responsibility with reference to the commodities ended upon delivery to the purchaser in accordance with the terms of the contracts. The invitation to bid, the bid, the acceptance of that bid, the delivery and acceptance of the goods, and the passage of title to the commodities, all took place within the state of Washington.

And, we put this question: "By this process, had the goods entered into the stream of exportation, thereby rendering them immune from local taxation?"

Holding that the seafood was not an export at the time the tax accrued because *certainty* of export was wanting even though the goods had been delivered to storage depots for overseas shipment, this court sustained the tax, saying, at page 571:

> There was a possibility, within the purview of the rules, that these goods might find their way into domestic commerce. The goods were of a character that made their domestic use possible. This is supported by the court's finding, in the instant case, that similar items, so packed, stored, and purchased from appellant, were domestically consumed.
>
> We conclude that, at the time of delivery of the sea food by appellant and the consummation of the sale to the United States government, the goods in question were not in the stream of export, as that term is defined in the above-cited cases.

The court relies, too, upon *Gough Indus., Inc. v.*

State Bd. of Equalization, 51 Cal. 2d 746, 747, 336 P.2d 161 (1959), *cert. denied*, 359 U.S. 1011, 3 L. Ed. 2d 1037, 79 S. Ct. 1151 (1959), which, I think, is readily distinguishable from the instant case. There the goods—electrical products—were sold by a California manufacturer to the Arabian American Oil Company and Trans-Arabian Pipe Line Company for use in Saudi Arabia upon a call for bids by the purchaser:

> Bidders were informed that all purchases were made strictly for direct export to scenes of operations in foreign countries and that it was anticipated bidders' quotations would show export prices or export discounts applicable. They were also informed that landing and receiving conditions in Saudi Arabia were such that specialized packing was required and that if they could not fulfill these specialized packing requirements with their own facilities, they should so indicate on their quotations.

In the present case, the goods were not to be packed for export but instead delivered to the GSA in Tacoma which then packed them for overseas shipment. In *Gough*, the goods were delivered to a truck carrier pursuant to an export purchase, then to a packer for overseas packing where title passed to the foreign purchaser, and the packer packed and crated the goods according to the foreign purchaser's instructions and delivered them by truck carrier to the ocean carrier which transported them to Saudi Arabia. Although it could be arguably claimed in

Gough that the goods were irrevocably exported when the taxpayer transferred title to the foreign purchaser, with delivery to the packer who then, acting as the purchaser's agent and under his direction, packed and crated them and carried them on board the ships, no such argument can sensibly be made here. In the instant case, the GSA at all times as between seller and purchaser retained full discretion to divert the goods to ports in the United States—and in fact did so divert some of them—and they could not be said to be exports at the time the tax was imposed upon Carrington's business of selling them. Here, the machines did not actually become exports at any time prior to delivery to the General Services Administration, and GSA did not serve as agents for Carrington, but as owner in repacking, loading and documenting the machines for overseas transportation and delivery. The equipment sought to be taxed here was domestic goods at all stages of its existence from the point of manufacture to its sale and delivery to a domestic purchaser at a domestic location.

This court now takes the rationale of *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 91 L. Ed. 80, 67 S. Ct. 156 (1946), beyond its farthest reaches to a point where, if logically applied, it will establish a tax shelter on all domestic commerce which ultimately is destined to wind up in foreign commerce. Although the *Richfield* case involved a sales tax sought to be collected upon oil actually delivered from dockside storage into a ship's tanks

for delivery to a foreign purchaser, while the ship floated at dockside, the tax to be collected here is upon the business transaction of retailing occurring with respect to machinery before loading. The Supreme Court in *Kosydar v. National Cash Register Co.*, ... U.S. ....., 40 L. Ed. 2d 660, 94 S. Ct. 2108 (1974), referring to *Richfield*, subsequently observed "that the delivery of oil into the storage tanks of a New Zealand-bound steamer 'marked the commencement of the movement of the oil abroad.' " I would not, as the court now does, move the point of irrevocability to a point where it is still revocable. The machinery here, even under the *Richfield* case, cannot, therefore, be classified as exports at a point preceding its repacking by General Services Administration and probably not earlier than the actual loading on board by the General Services Administration.

Whatever doubts may be said to exist as to the application of the *Richfield* case are laid to rest, I think, in *Kosydar v. National Cash Register Co., supra.* There the National Cash Register Company maintained two wholly separate divisions for marketing purposes, one domestic and the other international. All of the taxable activities at issue involved the international division. In accordance with company procedures, when a salesman from the international division received a customer's order an individual order form would be completed. The machine as ordered would then be built

to specification, taking into account the commer-

cial peculiarities of the country to which it is to be shipped and the buyer's individual needs.

After manufacture, the machine is inspected, packed, and crated for shipment aboard. The crated machine is then taken to an NCR warehouse in Dayton, to await foreign shipment. The machines relevant to this case were in storage in the Dayton warehouse, awaiting shipment, on December 31, 1967, when the petitioner Tax Commissioner assessed a personal property tax upon them.

NCR appealed the Commissioner's assessment to the Board of Tax Appeals of the Ohio Department of Taxation. Its basic claim was that the "international inventory" in the Dayton warehouse was made up of exports, and thus was immune from State taxation under the Import-Export Clause. In support of this contention, NCR offered evidence to show that, because of their unique construction and special adaptation for foreign use, the crated machines were not salable domestically. Further evidence was offered to show that no piece of equipment built for the international division has ever gone anywhere but into that division; that there is no recorded instance of a machine that was sold to a foreign purchaser being returned; and that no exported item has ever found its way back into the United States market.

(Footnotes omitted.) Reversing the Supreme Court of Ohio which had sustained the tax immunity, *National Cash Register Co. v. Kosydar*, 35 Ohio St. 2d 166, 298 N.E.2d 559 (1973), and upholding the tax, the United States Supreme Court said:

> By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute; no duties or imposts are allowed "except what may be absolutely necessary for executing [a State's] inspection Laws." Consequently, the essential question in cases involving the Clause is a narrow one: is the property upon which a tax has been sought to be imposed an "export," and thus entitled to protection under provision's literal terms?

(Footnote omitted.) *Kosydar* describes *Coe v. Errol*, 116 U.S. 517, 29 L. Ed. 715, 6 S. Ct. 475 (1886), as the "seminal case on the subject," and gives renewed vigor to it. That was a case involving a shipment of spruce logs cut in Maine and New Hampshire, and assessed for taxes while detained by low water in Errol, New Hampshire, when being floated downriver to Lewiston, Maine. Reaffirming, the court in *Kosydar* quoted from that earlier *Coe* opinion:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" 116 U.S., at 525.

That question was answered in the negative. Recognizing that its task was to set a "point in time when State jurisdiction over the commodities of commerce begins and ends," *id.*, at 526, the Court concluded that

> "[S]uch goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, *until they have been*

> *shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.*" *Id.*, at 527 (emphasis added).

Since the logs in *Coe* had not begun a "final movement for transportation from the State of their origin to that of their destination," *id.*, at 525, the Court held that the Constitution provided no immunity from local taxation.

The basic principle of *Coe* v. *Errol* is a simple one—the exemption from taxation in the Import-Export Clause "attaches to the export and not to the article before its exportation." *Cornell* v. *Coyne*, 192 U.S. 418, 427.

and,

> As a practical matter, it might well be doubted that the "diversion potential" of the crated portions of the cement plant in *Empresa Siderurgica* was any greater than that present here. But, even assuming *arguendo* the validity of NCR's arguments about the practical certainty of export here, we think it plain that the warehoused machines are not entitled to the protection of the Import-Export Clause. Mr. Justice Frankfurter put the matter succinctly in *Joy Oil Co.* v. *State Tax Comm'n*, 337 U.S. 286, 288:
>
> > "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."
>
> We may accept as fact the respondent's assur-

> ances that the prospect of eventual exportation here was virtually certain. "But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." *Empresa Siderurgica, supra*, at 157. Given the absence of an entrance of the respondent's machines into the export stream, the immunities of the Import-Export Clause are unavailable.

and, finally:

> As Mr. Justice Holmes put the matter in *A. G. Spalding, supra*, [262 U.S. 66, 67 L.Ed. 865, 43 S. Ct. 485], at 69:
>
> > "[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary."
>
> Our prior cases have determined that the protections of the Import-Export Clause are not available until the article at issue begins its physical entry into the stream of exportation. We find no reason to depart from that settled doctrine.

That an article is not an export until it has been irrevocably committed to overseas shipment is the commonsense view—a view supported by the very language of the export-import clause of the federal constitution. U.S. Const. art. 1, § 10. The

founders of the constitution could not have selected more precise language to bar the maritime states from levying a toll upon commerce of the inland states and at the same time giving no tax immunity to the articles of commerce and to the services affecting the movement of goods from the place of origin within the separate states to the ports of the nation. Where the constitution uses the nouns "imports" or "exports," it necessarily avoids such terms that describe a process or activity such as importing or exporting; it narrows the tax immunity down to a point where the article described as an "export" has reached the place that it can no longer be said to be a part of the mass of property within a state. The billions of dollars worth of goods piled on the docks of the nation's ports, or within nearby warehouses and storage depots, can hardly be said to be exports at that stage of the journey, even though documented for overseas shipment and ultimate delivery. They and the business activities connected with them are at that point still drawing all of the beneficial and protective services of the state and municipality in which they are kept, including those provided by police, firemen, inspectors and all of their equipment and paraphernalia. They have the use of the public streets, highways, utilities and ports. The courts and the public schools and colleges and publicly-supported medical services have been and remain available to the employees and managers of the businesses connected with the extracting,

manufacturing, wholesaling, retailing, transporting, warehousing, loading, unloading activities connected with or affecting the goods. The goods and the transactions affecting them should, therefore, bear their fair share of the taxes imposed upon them or the businesses connected with them to support the state and local services precisely as do all other goods and businesses so taxed within the state.

ROSELLINI, HUNTER, and HAMILTON, JJ., concur with HALE, C.J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

REMITTITUR

No. 42791

Thurston County No. 46494

THE CARRINGTON COMPANY, *Respondent*,

v.

THE DEPARTMENT OF REVENUE, *Appellant*.

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on October 10, 1974, became the final judgment of this court in the above entitled case on January 3, 1975. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

No cost bill having been filed, costs are deemed waived.

The petition for rehearing was denied by order dated January 3, 1975.

cc: Mr. William D. Dexter
Mr. Timothy R. Malone
Mr. David W. Sandell
Mr. William C. Oltman
Reporter of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 6th day of January, A.D. 1975.

(SEAL)

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington.

IN THE SUPREME COURT
OF THE
STATE OF WASHINGTON

No. 42791

Department.....

ORDER
DENYING
PETITION FOR REHEARING

THE CARRINGTON COMPANY, *Respondent,*

v.

THE DEPARTMENT OF REVENUE, *Appellant.*

The Court having considered the appellant's petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 3rd day of January, 1975.

By the Court:

FRANK HALE
Chief Justice

APPENDIX C

82.04.250 ————TAX ON RETAILERS. Upon every person except persons taxable under subsection (9) of RCW 82.04.260 engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundreths of one percent.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-2395

OPINION

SUMITOMO FORESTRY CO., LTD. OF JAPAN,
Plaintiff-Appellee,

v.

THURSTON COUNTY, WASHINGTON, a legal subdivision of the State of Washington,
Defendant-Appellant.

[October 8, 1974]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Before: HUFSTADLER and WRIGHT, Circuit Judges, and WILLIAMS,* District Judge.

WRIGHT, Circuit Judge:

In this case we must decide whether Thurston County, Washington, may impose an *ad valorem* tax on logs stored at the Port of Olympia awaiting ships for transportation to Japan. The district court held that the logs were in the process of exportation and that the tax was, therefore, a state imposed duty on exports prohibited by Article I, Section 10, Clause 2,

of the United States Constitution.[1] Following submission of the appeal, we vacated our action pending the Supreme Court's disposition of *Kosydar v. National Cash Register Co.*, ... U.S. ....., 42 U.S.L.W. 4767 (U.S., May 20, 1974). After the opinion therein was filed, we vacated the judgment of the district court and remanded for reconsideration in light of the decision in *Kosydar*. The district court concluded that *Kosydar* did not affect its earlier disposition. We disagree, and reverse with directions to the district court to enter judgment in favor of appellant Thurston County.

The parties submitted the case on stipulated facts. Sumitomo is a foreign corporation which imports logs to Japan. Each summer it takes orders from its Japanese customers and buys logs to meet demand.[2] The logs in issue were purchased in Washington state and delivered to Sumitomo f.o.b. the Port of Olympia. The seller performed all sorting, scaling, loading, and unloading of the logs except they were not sorted by length at delivery. The logs were then stored in a storage yard at the port awaiting ships to take them to Japan.

In order to load ships efficiently as they arrive at the port, Sumitomo continuously had a supply of

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*Of the Northern District of California.

[1]No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . .

[2]Sumitomo's purchases exceeded orders by 10%, but this was merely "to account for those unavoidable problems which necessarily arise when dealing with a semi-perishable commodity."

logs on hand in the storage area. The average turnover was 45 days, although specific logs may have stayed in the storage area for a shorter or longer period of time. All logs were stored only as long as necessary to await arrival of a ship upon which they could be loaded. Sumitomo sold no logs domestically, and the financial arrangements, the company's past practices, and the type of logs purchased indicated with reasonable certainty that the logs would be exported.

The issue on appeal is whether the county may levy an *ad valorem* tax on logs stored by Sumitomo at the Port of Olympia awaiting shipment. We hold that it may.

Although Article I, Section 10, Clause 2, of the Constitution prohibits a state from imposing a duty on exports, property within the state is not exempt from taxation solely because it may be exported in the future. *See, e.g., Empresa Siderurgica, S.A. v. Merced County*, 337 U.S. 154 (1949). The exemption from taxation attaches only after the property has entered the export process. The problem is to define the point at which that process begins. *Kosydar v. National Cash Register Co.*, ... U.S. ....., 42 U.S.L.W. 4767, 4770 (U.S., May 20, 1974). Appellant county contends that the logs do not begin the export process until they are loaded on the ship to be transported to Japan. Appellee Sumitomo argues that logs stored at the port awaiting the first avail-

able ship have begun the export process and are exempt from taxation.

Sumitomo's position must be rejected as it is contrary to the holding in *Coe v. Errol*, 116 U.S. 517 (1886). In *Coe* the Court was concerned with the point at which goods enter the stream of interstate commerce and thereby become protected by the Interstate Commerce Clause from certain local taxation. Although *Coe* dealt with the Interstate Commerce Clause, its standard for the point at which goods commence an interstate journey has been explicitly adopted to determine the point at which goods commence a foreign journey and thereby become "exports" under Article I, Section 10, Clause 2. *Kosydar v. National Cash Register Co.*, *supra*, at 4770; *Empresa Siderurgica, S.A. v. Merced County*, *supra* at 156; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 79 (1946).

Applying the *Coe* standard to Sumitomo's logs, it is clear that they had not yet become "exports" immune from local taxation when the *ad valorem* tax was levied. In *Coe* the Court considered two collections of logs. The first had been cut in Maine and floated down the Androscoggin River enroute to another location in Maine. The course of the River took the logs through the town of Errol, New Hampshire, where they were delayed by low water. The Court held that these logs were merely passing through New Hampshire and were already in the

course of commercial transportation. Therefore, they enjoyed constitutional protection from taxation. 116 U.S. at 525.

The second crop of logs had been cut in New Hampshire and brought to Errol to be floated out of state. The logs were floated in and placed on the banks of a tributary of the Androscoggin River awaiting commencement of the journey. The Court held that the logs had not yet begun their journey and were not constitutionally protected:

> There must be a point of time when [the logs] cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to State of their destination, or have started on their ultimate passage to that State.

116 U.S. at 525.

Sumitomo's logs are in the same position as the second collection of logs in *Coe*. They were cut in the

forests of Washington state and taken to an entrepot within that state, the port of Olympia, to await shipment out of the state. They had neither been committed to a common carrier for export, *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), nor loaded upon the ship that would take them to Japan, *Richfield Oil Corp. v. State Board, supra.*[3] Neither *Spalding*, *Richfield*, nor any other case of which we are aware, suggests that *Coe* is no longer controlling in cases presenting similar facts. To the contrary, both *Richfield* and *Empresa Siderurgica, S.A. v. Merced County, supra*, cite *Coe* approvingly and rely on its standard. Any doubt of the viability of *Coe v. Errol* has been dispelled by the language in *Kosydar.*[4] Thus, under *Coe*, Sumitomo's logs were not "exports" while stored at the port awaiting shipment.

Sumitomo makes two counter arguments to support its position. First, it argues that the quality

[3]Although *Spalding* and *Richfield* involved sales taxes, each result explicitly depended on the point at which the goods commenced their journey and thereby became "exports."

[4]Noting that the Court had adhered to the basic principle of *Coe v. Errol* for the nearly 90 years since that case was decided, *Kosydar v. National Cash Register Co., supra*, at 4768, Justice Stewart, writing for a unanimous Court, stated:

> It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. The Court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, "it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question." *Coe, supra*, at 526.

Id. at 4770.

of the logs, the contractual and financial arrangements covering them, and Sumitomo's past practices indicated with reasonable certainty that the logs would be exported. Thus, there was no reasonable probability that the logs would be diverted to the domestic market after escaping taxation.

There is some case law support for the conclusion that certainty of exportation is a criterion for determining whether exportation has begun. In *Richfield* the Court concluded that oil became an "export" when loaded on a ship bound for a foreign destination, even though the ship was not a common carrier. The Court reasoned that the theoretical possibility of diversion to the local market should be overlooked because it was reasonably certain that the oil was going to be delivered outside the United States. 329 U.S. at 82-83.

The reliance on the certainty of export in *Richfiield* was, however, used merely to excuse the fact that the ship was not a common carrier. Certainty of export evidenced by financial and contractual relationships does not by itself render goods "exports" before the commencement of their journey abroad. *Empresa Siderurgica, S.A. v. Merced County, supra* at 156-57.[5] Thus even if we "accept

[5]*See also Cornell v. Coyne*, 192 U.S. 418 (1904). *Cornell* involved Article I, Section 9, Clause 5, which prohibits Congress from levying a tax on goods "exported from any State." But this difference is irrelevant for determining the point at which the exportation process begins. *Empresa Siderurgica, S.A. v. Merced County, supra* at 156 & n.2; *Richfield Oil Corp. v. State Board, supra* at 83.

as fact the [appellee's] assurances that the prospect of eventual exportation here was virtually certain," the immunities of the Import-Export Clause are unavailable absent an actual entrance of the appellee's logs into the export stream. *Kosydar v. National Cash Register Co., supra,* at 4770.[6] Since nothing in *Richfield* undermines *Coe* on the question of when the journey begins, the fact that diversion to the domestic market was unlikely does not remove Sumitomo's logs from the "entrepot" standard *Coe* announced.

Second, Sumitomo argues that *Carson Petroleum Co. v. Vial,* 279 U.S. 95 (1929), controls this case and undermines the validity of *Coe.* In *Carson,* oil was being transported from Texas, Oklahoma, and Kansas to Europe. The journey consisted of railroad transportation through Louisiana to a location near New Orleans. There the oil was transferred to shore tanks to await the arrival of ships for the ocean voyage. Shore based storage tanks were used to avoid the necessity of ships being delayed awaiting the arrival of sufficient oil to comprise a full load, and

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[6]The likelihood of eventual exportation was probably even greater in *Kosydar* than under the facts presented in this case. The taxpayer in *Kosydar* was engaged in the manufacture of business machines, and its wholly separate international division did not commence manufacture until actual receipt of foreign orders. The machines produced were designed for the peculiar foreign market, using unique keyboards, characters, and decimal point placement, and quite often were designed to utilize the electric supply of the foreign country which often differs from that in standard use in this country. Each machine so constructed was eventually exported, and none ever re-entered the domestic market.

all oil stored was awaiting the arrival of a ship for transportation to Europe. The Court held that Louisiana could not tax the oil being stored awaiting an available vessel.

Sumitomo argues that, as with the oil in *Carson*, its logs were being stored at the port only to await the arrival of a ship to transport them to Japan. This is true. But unlike the oil in *Carson*, Sumitomo's logs had not been traveling interstate prior to their storage at the Port of Olympia. *Carson* involved the interruption of an interstate/international journey that had admittedly begun long before the oil reached New Orleans. The Court held merely that when such a journey is interrupted by a geographically necessary change in transportation modes, reasonable delays and inventories to facilitate that change do not cause the goods to cease being "exports" or "goods in interstate commerce." Thus, *Carson* involved a situation similar to the first group of logs in *Coe* which were delayed by low water during their journey through New Hampshire.

Sumitomo's logs, on the other hand, were not interrupted on a journey through Washington from another state to a foreign destination. They were, like the second group of logs in *Coe*, products of Washington taken to an entrepot from surrounding areas within the state.[7] Thus, under the holding of

[7]Although we rely on the difference between out-of-state and in-state goods delayed at the water's edge, we do not hold that this distinction is necessarily conclusive in all factual situations. Specifically, we infer no holding concerning the situation where goods are

Coe they had not yet become "exports" falling under the protection of Article I, Section 10, Clause 2.

It is true that *Carson* did not explicitly distinguish the oil delayed at the port from the logs collected at the entrepot in *Coe* on the basis that the former had begun its journey in another state. Thus, it is not unreasonable for Sumitomo to contend that *Carson* casts doubt on the validity of *Coe*. But since *Coe* has been explicitly approved and its standard relied on in *Richfield*, *Empresa Siderurgica*, and most recently, in *Kosydar*—all decided after *Carson*—Sumitomo's interpretation of *Carson* must be rejected.

The logs upon which Thurston County levied its *ad valorem* tax had not yet become "exports" entitled to the protection of Article I, Section 10, Clause 2, of the United States Constitution. The judgment of the district court is reversed, and the case is remanded for entry of judgment in favor of appellant county.

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consigned to a common carrier within a state for out-of-state shipment but are delayed at the interface of two modes of transportation prior to leaving the state while still within the control of the common carrier. *See Empresa Siderurgica v. Merced County*, *supra* at 156-57; *A. G. Spalding & Bros. v. Edwards*, *supra*, *Coe v. Errol*, *supra* at 525. Nor do we intimate an opinion on the situation where goods are delivered to a port from out of state but are delivered to the control of the shipper. *See General Oil Co. v. Crain*, 209 U.S. 211 (1908). Finally, we note that the tax imposed on Sumitomo's logs was not levied for the reason that they were intended for exportation. *See Coe v. Errol*, *supra* at 525-26.

APPENDIX E

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KOSYDAR, Tax Commissioner of Ohio,

v.

NATIONAL CASH REGISTER CO.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 73-629.

Argued March 19, 1974—Decided May 20, 1974

Cash registers and other *machines built to foreign buyers' specifications*, which were *warehoused in Ohio awaiting shipment abroad, title, possession, and control remaining in respondent manufacturer, held not immune from state ad valorem tax, since the prospect of eventual exportation, however certain, did not start the process of exportation* and move the machines into the export stream, without which the immunity from local taxation conferred by the Import-Export Clause of the Constitution was not available. *Empresa Siderurgica v. County of Merced*, 337 U.S. 154. Pp. 4-10.

35 Ohio St. 2d 166, 298 N. E. 2d 559, reversed.

STEWART, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-629

ROBERT J. KOSYDAR, Tax Commissioner of Ohio, *Petitioner*,

v.

NATIONAL CASH REGISTER CO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

[May 20, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Import-Export Clause of the Constitution, Art. I, § 10, cl. 2, provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The issue for decision in this case is whether the

assessment of an ad valorem personal property tax by the petitioner Tax Commissioner of Ohio upon certain property of the respondent is in conflict with this Clause.

I

The respondent National Cash Register Company (NCR) has for many years engaged in the manufacture of cash registers, accounting machines, and electronic data processing systems, which it markets worldwide. Its home offices, main production plant, and warehouse are located in Dayton, Ohio. For marketing purposes, NCR is organized into two divisions, domestic and international, each wholly separated from the other. It is with the operations of the latter division that this case is concerned.

NCR maintains no inventory of machines which are available to meet incoming orders from foreign customers. Rather, when a salesman from the international division receives an order from a customer, an individual order form is completed. The machine is then built to specification, taking into account the commercial peculiarities of the country to which it is to be shipped and the buyer's individual needs.

After manufacture, the machine is inspected, packed, and crated for shipment abroad. The crated machine is then taken to an NCR warehouse in

Dayton, to await foreign shipment.[1] The machines relevant to this case were in storage in the Dayton warehouse, awaiting shipment, on December 31, 1967, when the petitioner Tax Commissioner assessed a personal property tax upon them.[2]

NCR appealed the Commissioner's assessment to the Board of Tax Appeals of the Ohio Department of Taxation. Its basic claim was that the "international inventory" in the Dayton warehouse was made up of exports, and thus was immune from State taxation under the Import-Export Clause. In support of this contention, NCR offered evidence to show that, because of their unique construction and special adaptation for foreign use, the crated machines were not salable domestically. Further evidence was offered to show that no piece of equipment built for the international division has ever gone anywhere but into that division; that there is no recorded instance of a machine that was sold to a

[1]There is often a time lag between production and final shipment, and an inventory of international machines is therefore built up at the Dayton warehouse. The delays in eventual shipment occur for a number of reasons. In some cases, recipient countries will not allow partial shipments, so when a large order has been placed and the production cycle is slow, the machines must be consolidated and stored prior to shipment. In the electronic data processing area, the component parts of a shipment are often produced at several different locations, necessitating a consolidation prior to shipment. In other instances, delay in final shipment is caused by difficulties in procuring importation licenses or the uncertainties of the international monetary situation.

[2]Under Ohio Rev. Code § 5709.01, all personal property located and used in business within the State is subject to an ad valorem tax. Ohio Rev. Code § 5711.16 provides that articles which have at any time been manufactured are subject to the tax.

foreign purchaser being returned; and that no exported item has ever found its way back into the United States market.[3]

The Board of Tax Appeals nonetheless upheld the Commissioner's assessment. It ruled that even if the crated machines were irrevocably committed to export, the immunity from State taxation conferred by Art. I, § 10, cl. 2, did not attach until the property actually started on its journey to a foreign destination. Since the machines here had not yet entered the export stream, the Board of Tax Appeals concluded that they were still subject to the personal property tax.

The Supreme Court of Ohio reversed this decision by a divided vote. 35 Ohio St. 2d 166, 298 NE 2d 559. Relying on the evidence about the domestic nonsalability of the machines, the state court concluded that there was a "certainty of export" in this case. Given that "certainty," the court thought it irrelevant for Import-Export Clause purposes that the taxed machines had not, on the date of the assessment, been moved from the storage facility in

[3]A number of factors make domestic sales of the machines impractical. For one thing, the keyboards, printing mechanisms, characters, dispensing mechanisms, and decimal point placement of the machines are geared to the particular monetary system employed in the customer's country. Moreover, the machines are quite often designed for use on electrical systems not prevalent in this country. And, even when mechanical problems do not exist, the fact remains that merchandising techniques in this country are considerably more sophisticated than those in many other nations, so as to make machines designed for foreign use somewhat obsolete in the domestic market.

Dayton. We granted certiorari, ... U.S. ....., because the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution.

II

By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute; no duties or imposts are allowed "except what may be absolutely necessary for executing [a State's] inspection Laws."[4] Consequently, the essential question in cases involving the Clause is a narrow one: is the property upon which a tax has been sought to be imposed an "export," and thus entitled to protection under the provision's literal terms?

The seminal case on the subject is *Coe v. Errol*, 116 U.S. 517. *Coe* involved a shipment of spruce logs that had been hewn at various locations in Maine and New Hampshire, and were to be floated down the Androgscoggin River for manufacture and sale in Lewiston, Maine. The logs were detained by low water in the town of Errol, New Hampshire, where the local selectmen assessed a number of taxes upon them. The owners of the logs contested the assessments, claiming that the property was immune from taxation under both the Commerce and Import-Export Clauses, since the river served as a "public highway" for the interstate shipment of timber. The

[4]There is no claim that this exception is applicable in any way in the present case.

Supreme Court of New Hampshire sustained the tax, and this Court affirmed.

Writing for the Court, Mr. Justice Bradley viewed "the precise question for solution" as follows:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" 116 U.S., at 525.

That question was answered in the negative. Recognizing that its task was to set a "point in time when State jurisdiction over the commodities of commerce begins and ends," *id.*, at 526, the Court concluded that

> "[S]uch goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, *until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.*" *Id.*, at 527 (emphasis added).

Since the logs in *Coe* had not begun a "final movement for transportation from the State of their origin to that of their destination," *id.*, at 525, the Court held that the Constitution provided no immunity from local taxation.

The basic principle of *Coe v. Errol* is a simple one—the exemption from taxation in the Import-Export Clause "attaches to the export and not to the article before its exportation." *Cornell v. Coyne*, 192 U.S. 418, 427. This Court has adhered to that prin-

ciple in the almost 90 years since *Coe* was decided, and the essential problem in cases involving the constitutional prohibition against taxation of exports has therefore been to decide whether a sufficient commencement of the process of exportation has occurred so as to immunize the article at issue from state taxation. Of necessity, the inquiry has usually been a factual one. For example, in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, this Court decided that delivery of baseballs and bats to an export carrier for shipment to Venezuela constituted a significant "step in exportation," *id.*, at 68, and exempted the goods from a federal revenue tax.[5] Similarly, in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, it was held that the delivery of oil into the storage tanks of a New Zealand-bound steamer "marked the commencement of the movement of the oil abroad," *id.*, at 83, making the product immune from a California sales tax.

Yet, even if the inquiry in cases like *Spalding* and *Richfield Oil* was specifically directed at determining whether particular acts of movement toward a final destination constituted sufficient entrance into the export stream to invoke the pro-

[5]The *Spalding* case arose under Art. I, § 9, cl. 5, of the Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." A long line of cases has recognized, however, that the meaning of "export" is the same under that provision as under the Import-Export Clause. See, *e. g.*, *Brown v. Maryland*, 12 Wheat. 419, 445; *Turpin v. Burgess*, 117 U.S. 504, 506; *Cornell v. Coyne*, 192 U.S. 418, 427-428; *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 83.

tection of the Import-Export Clause, this Court has never lost sight of one basic principle—at least *some* such entrance is a prerequisite to the Clause's operation. That fact is well-illustrated by the opinion of the Court in *Empresa Siderurgica v. County of Merced*, 337 U.S. 154. That case involved a California cement plant, which had been sold to a Colombian buyer. Title to the property had passed to the buyer, and a common carrier had begun to dismantle the plant and crate it for shipment to Colombia.

At a stage when 12% of the plant had been shipped out of the country, the county of Merced levied a personal property tax on the remaining 88%. This balance included about 10% of the original plant that had been dismantled and crated or prepared for shipment, but which had not yet begun its voyage to Colombia. This Court held that the tax on the 88%, including this crated portion, did not violate the Import-Export Clause. Adhering to the test of *Coe v. Errol*, the Court stated:

> "Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end in it * * *. It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice." *Id.*, at 156-157.

Since the 88% of the cement plant had not yet begun its out-of-state journey, the Court concluded that the

California tax was not once upon "exports" within the meaning of the Clause.[6]

We can find little in the case before us to take it outside the ambit of the *Empresa Siderurgica* holding. At the time that the respondent's machines were assessed for taxation, they were sitting in the Dayton warehouse awaiting shipment. Title and possession were in NCR, payment had not yet been made by the putative purchasers, no export license had issued, and the machines were in the complete control of the respondent. More important, there had simply been no movement of the goods—no shipment, and no commencement of the process of exportation. Given this factual setting, it would require a sharp departure from nearly a century of precedents under the Import-Export Clause for us to conclude that the machines were "exports" and exempt from state taxation.

In an effort to avoid the clear holdings of our prior cases, NCR emphasizes the peculiar nature of

[6] In a decision rendered two weeks after *Empresa Siderurgica*, the Court made it clear that not every preliminary movement of goods toward eventual exportation was sufficient to invoke the protection of the Import-Export Clause. In *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286, the question was whether an ad valorem property tax on gasoline stored in tanks at Dearborn, Michigan, for eventual export to Canada, was permissible under the Clause. The gasoline had previously been purchased by a Canadian corporation, had been certified as purchased for export, shipped by rail to Detroit under bills of lading marked "For Export to Canada," and eventually placed in the Dearborn tanks. The bulk of the gasoline remained in the tanks for over 15 months, because of an apparent shortage of shipping space by water. This Court held that, despite the initial transportation of the gasoline to Dearborn, the hiatus in the journey subjected the property to state taxation.

the taxed machines, and contends that their non-adaptability to domestic use brought about a "certainty of export." Because of this practical absence of "diversion potential," NCR argues that the ultimate placement of the machines into the stream of exportation is a mere formality, and that this Court should treat the crated property as already having become an export in the constitutional sense even as it sits in the Dayton warehouse.

As a practical matter, it might well be doubted that the "diversion potential" of the crated portions of the cement plant in *Empresa Siderurgica* was any greater than that present here.[7] But, even assuming *arguendo* the validity of NCR's arguments about the practical certainty of export here, we think it plain that the warehoused machines are not entitled to the protection of the Import-Export Clause. Mr. Justice Frankfurter put the matter succinctly in *Joy Oil Co. v. State Tax Comm'n*, 337 U.S. 286, 288:

> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

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[7] Indeed, it might well be contended that in this case "There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue, the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment." 35 Ohio St.2d, at 175; 298 N. E.2d, at 564-565 (O'Neill, C. J., dissenting).

We may accept as fact the respondent's assurances that the prospect of eventual exportation here was virtually certain. "But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." *Empresa Siderurgica, supra,* at 157. Given the absence of an entrance of the respondent's machines into the export stream, the immunities of the Import-Export Clause are unavailable.

It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. The Court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, "it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question." *Coe, supra,* at 526. As Mr. Justice Holmes put the matter in *A. G. Spalding, supra,* at 69:

> "[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary."

Our prior cases have determined that the protections of the Import-Export Clause are not available until the article at issue begins its physical entry into the stream of exportation. We find no reason to depart from that settled doctrine.

For these reasons, the judgment of the Supreme Court of Ohio is

Reversed.

APPENDIX F

A. The undisputed facts do not support respondent's argument that its sales to GSA constituted the first step in the continuous movement of the goods in export to a foreign purchaser.

A close examination of the undisputed facts clearly demonstrate that respondent is not an exporter and that the sales in question were consummated by wholly intrastate transactions between an in-state seller and an in-state purchaser prior to any activity or transaction involving the export of the respondent's product to the military establishments which ordered these products from the GSA for overseas use.

The facts are contained in a short stipulation (7 paragraphs and 2 exhibits) and the uncontroverted testimony (including 4 exhibits introduced in connection therewith) of four witnesses called by respondent.

The stipulation of facts indicate that respondent, a Washington corporation based in Seattle as a distributor of construction equipment, farm machinery and replacement parts therefor, made the sales in question to the GSA pursuant to a solicitation, offer and award represented by Exhibit A attached to the stipulation and pursuant to specific order forms issued by the GSA represented by Exhibit B attached to the stipulation (Tr. 3-4).

The first page of the solicitation, offer and award

indicates that it was issued by the Procurement Division of the GSA in Auburn, Washington; that the offer was to be delivered to that office; and that it was made to cover a year's requirements for International Harvester vehicle parts and accessories (Tr. 6).

Attached as part of the solicitation are six pages of material explaining the solicitation (Tr. 10-15). It states that the contract is to provide for the normal supply requirements of "General Services Administration, Federal Supply Services, Auburn, Washington" (Tr. 11) and that "Prices are requested f.o.b. destination to the General Services Supply Distribution Facility, Warehouse No. 50, 901 Alexander Avenue, Tacoma, Washington 98421" (hereinafter referred to as Warehouse 50) (Tr. 11). The solicitation further reads:

> "This contract is established to provide a ready source of supply from the original equipment manufacturer and replacement parts manufacturer and/or their distributors or dealers from which Region 10, FSS, can obtain replacement parts for International Harvester vehicles and accessories to support military requirements for southeast Asia, Korea, Japan and Alaska."

The solicitation further provides for inspection and acceptance of the equipment at the destination (Warehouse 50) and requires the seller to pack the equipment to insure carrier acceptance and safe delivery to the destination (Tr. 15).

The solicitation makes no mention of any ship-

ment of equipment to other than the destination at Warehouse 50; and clearly indicates that the GSA in Auburn is the purchaser.

The orders pursuant to which respondent made the sales in question (Stip. of Facts, Ex. B, Tr. 16) show the purchaser as the GSA, Auburn, Washington, and the destination of the equipment as Warehouse 50 (Tr. 16). Respondent was required to mark on the packages the requisition number and the overseas agency requesting the equipment from the GSA as shown on the orders (TR. 16).

Nevertheless, respondent predicates its whole argument on the unsupportable proposition that its sales in question were to a foreign destination of a foreign purchaser. There is absolutely nothing in the contractual relationship between respondent and the GSA to support this position. The facts that (1) the GSA ordered the goods in question to meet overseas military needs and (2) required the marking of the goods to reflect the overseas address of the agency do not convert these sales into export sales or respondent's delivery of the goods to the GSA at Warehouse 50 as the first step in exporting the goods to a foreign purchaser. The solicitation and order (Exhibits A and B) demonstrate that the respondent sold and delivered the goods in question to the GSA in Washington.

While there is nothing in the stipulation or contractual relationship between respondent and

GSA to indicate other than local sales by respondent to the GSA in Tacoma, the respondent nevertheless sought to establish by testimony that the sales in question were export sales.

The first witness, Mr. Burchfiel, testified that he was a federal civil service employee holding the position of manager for Warehouse 50 (St. 6) which was utilized by the GSA to receive, pack and ship non-stores, stores and direct delivery material which was not stockpiled by the GSA in its Auburn facility (St. 7, 8). He further testified as follows: There was a hold on some of the items that were received in Warehouse 50 (St. 12). After items were packed at Warehouse 50 a majority of the goods went to the Port of Tacoma for water carrier shipment overseas (St. 12). When the GSA delivered the goods to the Port it set the goods on the port dock and obtained a port release (St. 12). Material that was not sent overseas by water carrier was transported by military aircraft. If the goods were destined for air shipment to Japan or Korea they were shipped to the McChord Air Force Base and if destined for air shipment to Vietnam they were transported by commercial carrier to the Travis Air Force Base in California (Tr. 12, 13).

Mr. Stefani, chief of the receiving section (a warehouse foreman) of the GSA was respondent's second witness. He was in charge of the warehouse operation of the GSA in Auburn, of which Warehouse 50 is an auxiliary facility (St. 16, 27). This

warehouse was set up to process goods ordered by the Auburn office of the GSA (Tr. 16). Persons under his supervision unpacked every box destined for Warehouse 50 to verify its contents (including proper documentation) and sent the proper documents to the San Francisco office of GSA for payment (St. 16). He had no knowledge concerning the actual shipment of the goods from Warehouse 50. His only function was to get the material to the warehouse (Tr. 24). He did have knowledge, however, that if the warehouse received instructions from the Auburn office to hold goods received and stored in Warehouse 50 these goods were held as "frustrated freight" (Tr. 20-21). Stefani further testified that all of the goods ordered from respondent were not necessarily shipped overseas although he had no recollection of any that did not go overseas (Tr. 23).

Plaintiff's Exhibit No. 3 was introduced by respondent in connection with Stefani's testimony. It consisted of a representative order file which was maintained for the processing of goods pursuant to each order through Warehouse 50. The file contained the following:

1. Copy of GSA Form 1430 (purchase order) (Ex. 3, p. 8).
2. GSA Form 14 (routing slip and delivery acknowledgment) (Ex. 3, p. 7).
3. Material inspection and receiving report (Ex. 3, p. 6).
4. Copy of vendor's invoice (Ex. 3, p. 5).

5. Shipping order of vendor (Ex. 3, p. 4).
6. Export packing material receipt/control document (Ex. 3, p. 3).
7. GSA non-stores packing and shipping data sheet (Ex. 3, p. 2).
8. Order folder (Ex. 3, p. 1).

The purchase order, material inspection and receiving report, the vendor's invoice and the vendor's shipping order show Warehouse 50 as the destination of the goods and the GSA in Auburn as the consignee and purchaser. These documents require the goods to be marked with requisition information including the Auburn address of the GSA and the United States overseas agency which apparently placed an order for the material with the GSA.

The "Export Packing Material/Control Document" is used as a locator in the warehouse to tell in what bay the goods are stored. It gives the stock number, description, quantity, purchase order, number, date of receipt and location of the goods (Tr. 19).

The "Non-Stores Shipping Data" gives the quantity of material, purchase order, packer and packing date and nature of packing. It also shows shipping data. The sample form (Ex. 3, p. 2) shows the material was delivered to a carrier for transportation to the pier for shipment by water carrier (Tr. 20).

The next witness was Mr. Passage, a CPA. The

purpose of his testimony was to indicate from an examination of the record archives of the GSA that almost all of the goods shipped to Warehouse 50 by the sellers were shipped overseas (Tr. 34).[2]

The above references to the facts in this case are set forth in this reply brief primarily to indicate that there is no factual basis for the respondent's contention and the findings of the trial court that respondent's delivery of the goods in question to Warehouse 50 constituted a first step in a continuous, unbroken movement of the goods to an overseas destination of a foreign purchaser. The purchaser of the goods from respondent was the GSA in Tacoma, Washington—hardly a foreign purchaser. Respondent entered into no contract or relationship whatsoever with the military agencies which requested the goods from GSA and whose overseas requirements triggered the solicitations and orders in question. The transactions in which the respondent was involved ended at the time the goods were receipted for by the purchaser (GSA, Auburn, Washington) at their destination (Warehouse 50). Furthermore, the respondent did not deliver the goods to a carrier for ultimate delivery to any point other than Warehouse 50. What GSA intended to do with the goods after delivery by respondent is wholly irrelevant and im-

[2]The only additional testimony was by Mr. Duff, parts manager of respondent. His testimony concerned the pricing of the material supplied GSA by contract. He indicated that it was sold by respondent at a lower markup than general pricing because of the quantity of material ordered by GSA and that all of their sales to GSA were for delivery to the Tacoma warehouse (St. 40-41).

material. Any disposition of the goods beyond respondent's delivery to Warehouse 50 involves parties, contractual arrangements, shipments and transactions completely disassociated from respondent and its retailing activities. The respondent's knowledge and obligation concerning the goods in question ceased at the point it delivered the goods to the GSA in Tacoma. Respondent was not involved in the export of any goods. Obviously, the GSA did enter into arrangements with military establishments for the sale and shipment of the goods to their overseas agencies. It is these separate and distinct transactions that pertain to the exporting of the goods and not the transactions of which the respondent was a part. How can these purely local sales transactions between respondent and a domestic procurement agency of the United States Government for goods receipted for by the procurement agency in Washington be converted into a transaction involving continuous movement of goods to a foreign purchaser in foreign commerce? It cannot be so characterized.

Furthermore, the record does not establish any certainty of export. Obviously, the GSA acquired the goods in question to supply overseas military needs. Cancellation of orders received by the GSA after receipt by it and prior to shipment overseas precluded any overseas movement. Also, the record does not establish that the goods (International Harvester equipment parts) could not or were not diverted for

domestic use. While an infrequent occurrence, this did in fact happen to Warehouse 50 merchandise.

The achilles' heel of respondent's argument is the inference throughout its argument that the goods were purchased from it by overseas military establishments for overseas shipment when in fact the goods were purchased by a domestic procurement agency of the United States (GSA) for shipment to Tacoma, Washington. The trial court thus had no basis for the finding "When the goods sold by plaintiff to the overseas government purchasing officer were loaded aboard trucks at plaintiff's Seattle office, they commenced a continuous uninterrupted journey to Vietnam. There was no delay or stoppage in transit." (App. Br., p. 3). We do not have here an overseas government purchasing officer purchasing goods from respondent. The overseas government purchasing officer was purchasing from the GSA, not respondent. Respondent's purchaser was the GSA in Auburn. Neither did the goods commence an uninterrupted overseas journey when shipped by respondent to Warehouse 50. They were placed in storage awaiting further disposition. That the storage was intended to be temporary until repacking for reshipment does not change the fact of storage.